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No. 97-2044

Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA,

Petitioner,

vs.

HAGGAR APPAREL COMPANY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* ANHYDRIDES & CHEMICALS, INC., IKO INDUSTRIES, LTD. AND MARUBENI AMERICA CORPORATION IN SUPPORT OF RESPONDENT

RICHARD C. KING
Counsel of Record
JAMES CAFFENTZIS
PETER J. FITCH
FITCH, KING AND CAFFENTZIS
Attorneys for Amici Curiae
116 John Street
New York, New York 10038
(212) 349-7000

150060

Counsel Press LLC
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CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief, *amici curiae*.[1]

INTEREST OF *AMICI*

Amici, Anhydrides & Chemicals, Inc. (Anhydrides), IKO Industries, Ltd. (IKO), and Marubeni America Corporation (MAC), have all been parties in recent litigation before the Court of Appeals for the Federal Circuit (hereinafter "CAFC") in which the government has claimed that deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) is owed to determinations by Customs.[2] In those cases, *amici*, all importers who prevailed on appeal (one affirmance; two reversals) addressed in their briefs a large body of law specific to such determinations by Customs, based in precedents of this Court and the courts which have had jurisdiction over customs issues for more than 150 years. Amici's cases were among seven appeals pending before the CAFC at the same time, in each of which Customs argued for some new standard of deference to be applied to determinations by Customs officials.[3] *Amici* responded with citation to precedents of this Court precluding such a new standard of deference. The government's brief here does not address those precedents, nor does it advance any grounds for overruling them, notwithstanding the fact that several were specifically cited in the CAFC's opinion in *Anhydrides, supra*, at 1485, and cited by Haggar in its Brief in Opposition to the Petition for Certiorari, at 25, n. 10.

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1. Their consents have been filed with the clerk of this Court. This brief was authored by the *amici* and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

2. *See Anhydrides & Chems., Inc. v. United States*, 130 F.3d 1481 (Fed. Cir. 1997); *IKO Industries, Ltd. v. United States*, 105 F.3d 624 (Fed. Cir. 1997) and *Marubeni America Corporation v. United States*, 114 F.3d 202 (Fed. Cir. 1997). The first two are among those decisions cited by the government here as wrongly decided.

3. *See* letter of the Department of Justice to the Clerk of the CAFC, at Appendix A, 1a-3a.

INTRODUCTION

The issue raised by this case is whether the courts should review the instant determination by Customs independently, deciding the question of law *de novo*, or whether they should defer to the agency's interpretation of the law. On this most basic issue, *amici* agree with the respondent, Haggar Apparel Company, that the issue has long been settled judicially, and was further emphasized and codified by the Congress in 1980.

As this Court observed in 1850:

> The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinion of them, and importers, in cases of doubt, are entitled to have their rights settled by the judicial exposition of those laws, rather than by the views of the Department. (*Marriott v. Brune*, 9 Howard, 634, 635.) And though, as between the custom-house officers and the Department, the latter must by law control the course of proceeding (5 Stat. At Large, 566), yet, as between them and the importer, it is well settled, that the legality of all their doings may be revised in the judicial tribunals. (*Tracy et al. v. Swartwout*, 10 Peters, 95; *United States v. Lyman*, 1 Mason, C.C. 504; Opinions of Attorney-General, 1015.)

Greely v. Thompson, 51 U.S. 225, 234 (1850). This independent judicial approach has been consistently followed, and in 1980, at the urging of the Department of Justice among others, was codified in 28 U.S.C. § 2640 for customs classification and valuation issues such as presented here, at the same time a more deferential standard was provided for other issues in other areas of trade law.

> Mr. COHEN. Senator, I think the prime reason was because the cases within the court's present jurisdiction are reviewed by means of trial *de novo* rather than on the basis of the administrative record.

> It was not our intention to change that principle at all. Under those circumstances, given the fact that trial *de novo* is the most sweeping form of judicial review available, we felt that it was appropriate to continue to maintain the types of prerequisites to jurisdiction which now exist with respect to the court's present jurisdiction.

Hearings before the Subcommittee On Improvements In Judicial Machinery of the Committee On the Judiciary, S. 2857, June 23 and 27, 1978. Statement of David M. Cohen, Director, Commercial Litigation Division, Department of Justice.

The purpose of *amici*'s filing is to emphasize a principle of law, which has received little attention to date in this matter, which was developed by this Court and other courts in the exercise of their independent function. That principle, that doubts remaining after the court's analysis of a customs revenue provision should be resolved in favor of the importer, is the antithesis of the deference the government seeks here.

Determinations by Customs are distinguished from those of other agencies, and the cases such as *Chevron* and *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), which the government cites, are simply inapposite here, because none of them involve customs duties. The Solicitor General's claim in the Petition for a Writ of Certiorari, at p. 10, that the decision below represents a "clear departure . . . from the standards of deference required by the decisions of this Court," misrepresents the law and the facts. The decisions which are cited never applied to customs revenue laws. There has been no departure, because, historically, there has been no standard of deference in such matters, and the decision below is consistent with those decisions of this Court which apply to customs revenue laws.

A reversal by this Court would undermine *amici*'s cases, and more than 150 years of tariff law on *de novo* review of legal issues, and resolution of doubts in favor of the importer in classification issues such as this, without the necessary showing that these precedents are "unworkable or are badly reasoned" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), and *amici* therefore urge affirmance of the decision under review based on the precedents of this Court related to customs duties, which should be controlling here.

SUMMARY OF ARGUMENT

Definite principles of law have been laid down by this Court which apply to customs, but do not apply to other kinds of legislation. One of these, reflected in this Court's holding in *Hartranft v. Wiegmann*, 121 U.S. 609, 616 (1887)[4], that doubts in the interpretation of a customs revenue statute[5] should be resolved in favor of the importer, makes this Court's holding in *Chevron* and similar cases inapplicable here. No decision of this Court, or legislative action, has abrogated that principle. If, as the government alleges, the relevant language, "operations incidental to the assembly process," in the tariff classification provision in issue, subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, is "not plain and unambiguous" (Petition, *supra*, at 16), it would have to be ambiguous. The Court, in that case, need not deal with the provision itself, but should resolve that ambiguity in favor of the importer, affirming under its own precedents.

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4. As *Hartranft* is the first decision in which this Court applied the principle of liberal interpretation in favor of the importer for customs revenue laws, we will refer to this as the "*Hartranft* principle." That principle is one of statutory construction, indexed under "Construction: Doubt resolved in favor of importer" in the reports of the CAFC's predecessor (Index, 11 Ct. Cust. Appls. at 573 (1923)), and under "RULES OF CONSTRUCTION, § 51.8 *Liberal and strict construction*" in Sturm, Ruth F., Customs Law & Administration, Third Edition, Oceana Publications, New York (1996). The cases cited there treat it as such. It is not a presumption or standard of review; nor does it relate to the burden of proof; nor was it affected by the decision in *Jarvis Clark Co. v. United States*, 733 F.2d 873, 877 (Fed. Cir. 1984):

> The government argues that § 2643(b) is only a grant of general equity powers and was not intended to have any effect on the burden of proof faced by the importer.

5. We will use the term "customs revenue laws" to describe those customs duty provisions covering the classification or valuation of imported goods, as distinguished from customs procedural provisions, or those other tariff or trade statutes, such as antidumping or countervailing duty, which are better described as "international trade" law.

ARGUMENT

I. DEFINITE PRINCIPLES OF LAW HAVE BEEN LAID DOWN BY THIS COURT WHICH DO NOT APPLY TO OTHER KINDS OF LEGISLATION. ONE OF THESE MAKES THIS COURT'S HOLDING IN *CHEVRON* AND SIMILAR CASES INAPPLICABLE HERE.

A. Differences between customs and other areas of law.

The government argues that Customs' "determination" here, its regulatory limitation of the provisions of subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, is owed deference under this Court's decision in *Chevron*. In so doing, it ignores the few, but important, distinctions between the principles of law applicable to the Customs Service and to other administrative agencies.

> Tariff laws, while subject to the same rules of construction and legal principles as other legislative acts, yet have during a century and a half of application acquired certain characteristics not found in other legislation, and certain definite principles of law have been laid down by the courts in construing tariff laws, which of necessity do not apply to other kinds of legislation. *Stone & Downer Co., et al. v. United States*, 12 Ct. Cust. Appls. 62, 70, T.D. 40019 (1923).

Sturm, *supra*, § 51.1. This Court in a parallel case, *Stone & Downer Co., et al. v. United States*, 274 U.S. 225 (1927), firmly established the principle that *res judicata* is not applicable in customs classification cases. The reasons are clearly stated at pp. 231-37 of this Court's opinion, wherein customs duty cases are distinguished from other cases.

For purposes of the present case, however, the most important distinction between the laws applicable to tariffs and that applicable to other kinds of legislation is with regard to the principle next discussed.

B. In a case of ambiguity in a term in a customs revenue law, that ambiguity must be resolved in the importer's favor.

Where there are two reasonable interpretations of a tariff term in a customs revenue law, and a doubt remains as to the meaning Congress intended, the court should adopt that interpretation which favors the importer. The number of cases decided under this principle, and the period of time over which they were decided, establish without question that the principle is "workable."

The *Hartranft* principle was already established in this country by 1838 (*see* the opinion of Circuit Justice Story in *Adams v. Bancroft*, 3 Sumner, 384 (C.C.D. Mass, 1838)):

> . . . duties are never imposed upon citizens upon doubtful interpretations; for every duty imposes a burthen on the public at large, and is considered strictly, and must be made out in a clear and determinate manner from the language of the statute.

This principle was followed by the Court in its holdings in *United States v. Edwin B. Isham*, 84 U.S. (17 Wall.) 496, 504 (1873), citing cases on both sides of the Atlantic:

> 4. If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C.B., in *Gurr v. Scudds*, 11 Exch., 191, "a tax cannot be imposed without clear and express words for that purpose." *Conroy v. Warren*, 3 Johns. Cas., 259,

and in *Hartranft v. Wiegmann*, *supra*, at 616, which does the same:

> We are of the opinion that the decision of the Circuit Court was correct. But if the question were one of doubt, the doubt would be resolved in favor of the importer, "as duties are never imposed on the citizen upon vague or doubtful interpretations." *Powers v. Barney*, 5 Blatchford, 202; *United States v. Isham*, 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sumner, 384.

Similar language appears four years later in this Court's opinion in *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 474 (1891):

> We think the intention of congress that these goods should be classified as "gilling twine" is plain; but, were the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of congress to impose a higher duty should be expressed in clear and unambiguous language. *U.S. v. Isham*, 17 Wall. 496; *Hartranft v. Wiegmann*, 121 U.S. 609, 7 Sup. Ct. Rep. 1240; *Gurr v. Scudds*, 11 Exch. 190.

In those three decisions of this Court, and in *Eidman v. Martinez*, 184 U.S. 578, 583 (1902); *Swan & Finch Co. v. United States*, 190 U.S. 143 (1903) and *Benziger v. United States*, 192 U.S. 38 (1904), this Court has, in its own words, "repeatedly" (184 U.S., 583) applied this principle. It was so clearly accepted as to have become, by the time of the decision in *Rice v. United States*, 53 Fed. 910, 912 (CCA, Eighth Circuit, 1893) (cited with approval in *Benziger*, *supra*, at p. 54) "the uniform doctrine of the authorities." Twenty years later, in such decisions as *American Express Co. v. United States*, 3 Ct. Cust. Appls. 475, 479, T.D. 33121 (1913), *Newhall v. United States*, 4 Ct. Cust. Appls. 134, 137, T.D. 33410 (1913), and in later cases, including *United States v. Ducommun Hardware Corp., et al.*, 7 Ct. Cust. Appls. 353, T.D. 36904 (1924) and *VonBremen, Asche & Co. v. United States*, 12 Ct. Cust. Appls. 407, T.D. 40585 (1924), this principle had become a "settled rule," or "settled law," needing no citation.

The principle is clearly stated in *Swan & Finch*, *supra*, at 146:

> Where the burden is placed upon a citizen, if there be a doubt as to the extent of the burden it is resolved in favor of the citizen, but where a privilege is granted any doubt is resolved in favor of the government. In *Hartranft v. Wiegmann*, 121 U.S. 609, 616, the one rule was thus stated:
>
> > We are of opinion that the decision of the Circuit Court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, "as duties are never imposed on the citizen upon vague or doubtful

> interpretations." *Powers v. Barney*, 5 Blatch. 202; *United States v. Isham*, 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sumner, 384. See also *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 474.

The most recent decision of this Court[6] which applies this principle in interpreting a customs revenue law [there a classification provision] is *Benziger*, *supra*, which holds:

> This provision of the statute should be liberally construed in favor of the importer, and if there were any fair doubt as to the true construction of the provision in question, the courts should resolve the doubts in his favor. *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; *United States v. Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690; *Rice v. United States*, 4 C.C.A. 104, 10 U.S. App. 670, 53 Fed. 910.

192 U.S. at p. 54.

From *Isham* to *Benziger*, there were revisions of the tariff in 1883, 1890, 1894, and 1897. *See* "Tariff Acts Passed by the Congress of the United States from 1789 to 1909," House of Representatives Document No. 671, 61st Congress, 2d Session (1909). Had Congress, presumptively being aware of this Court's holdings, The *Brechteen Co. v. United States*, 854 F.2d 1301 (Fed. Cir. 1988) wished to change this principle, it could have done so.

The predecessors to the Court of International Trade (hereinafter "CIT") and CAFC, and other Federal courts, uniformly followed this principle. In *Rice v. United States, supra*, cited with approval in *Benziger*, the Court stated:

> . . . In a case of doubtful construction "and" would probably be used disjunctively, to prevent the imposition of pains and penalties, but it would not be so used for the

6. Under the Tariff Act of August 5, 1909, 36 Stat. 11, 105, § 29, the decisions of the Court of Customs Appeals from 1909-14 were not reviewable under any circumstance, and thus the nearly dozen decisions of that court cited herein are binding decisions of a court of last resort.

> purpose of imposing them; and so, in a doubtful case, it will not be used disjunctively for the purpose of imposing a tax or charge upon the citizen.

The rule for construction of statutes levying taxes or duties on the citizen is laid down by Lord Cairns, in delivering the judgment of the house of lords, (Partington v. Attorney General, L.R. 4 H.L. 100, 122) in this language:

> As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an "equitable construction," certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

Judge Story says:

> It is a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specially pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly

> and clearly import. Revenue statutes are in no just sense either remedial laws, or laws founded upon any permanent public policy, and therefore are not to be liberally construed.
>
> *U.S. v. Wigglesworth*, 2 Story, 369. And this is the uniform doctrine of the authorities. *Net & Twine Co. v. Worthington*, 141 U.S. 474, 12 Sup. Ct. Rep. 55; *U. S. v. Isham*, 17 Wall. 496; *Hartranft v. Wiegmann*, 121 U.S. 609, 7 Sup. Ct. Rep. 1240; *Powers v. Barney*, 5 Blatchf. 202; *Dean v. Charlton*, 27 Wis. 526; Suth. St. Const. 461, 462; Cooley, Tax'n, (2d Ed.) 266; Dwar. St. p. 749. 53 Fed. at 912.

Very simply, the court in *Rice* held that where the word "and" had two possible meanings, one conjunctive and one disjunctive, it would (and did) interpret the term conjunctively if to do so resulted in the lesser duty. However, it was also prepared to apply the less common "sometimes" used disjunctive meaning if that would result in the lesser duty.

The court's willingness to apply whichever of two or more possible meanings of a term results in the lowest duty, is illustrated by the court's application of a broad meaning to the term "waste" in *Central Vermont Railway Co. v. United States*, 10 Ct. Cust. Appls. 31, 36, T.D. 38260 (1920), while it applied a narrow meaning to the term "waste" in a different provision of the tariff in *United States v. Hatters' Fur Exchange*, 1 Ct. Cust. Appls. 198, 202, T.D. 31237 (1911). (In both cases giving the importer the benefit of such differing interpretations).

In one of the first decisions by the newly created Court of Customs Appeals, *United States v. Sussfeld*, 1 Ct. Cust. Appls. 51, 52 (1910), the government, which here bases its argument on an assumption that the law applicable to customs and other areas must be the same, instead argued that the law applicable to copyright and customs was different.

> It is urged in the brief of counsel for the Government that the Federal cases cited are not in point, for the reasons, as stated, that extreme liberality marks the interpretation of the copyright laws, and that decisions under that statute are unsafe precedents to follow in construing the tariff law. We need not determine whether counsel for the

> Government is correct in asserting that the courts are uniformly liberal in construing the copyright laws. If he is correct in this, it is equally true that the courts are liberal in favor of the importer in construing revenue statutes. See *Hartranft v. Wiegmann* (121 U.S., 609); *Swan & Finch Co. v. United States* (190 U.S., 143); and *Eidman v. Martinez* (184 U.S., 583).

In a long line of other decisions of the Court of Customs Appeals after *Sussfeld* on this issue, this principle of liberal construction in favor of the importer was restated and followed. These include *Woolworth v. United States*, 1 Ct. Cust. Appls. 120, 122, (1910) and *United States v. Wells Fargo & Co.*, 1 Ct. Cust. Appls. 158, 162 (1911). *See also Hatters' Fur Exchange, supra*; *United States v. Matagrin*, 1 Ct. Cust. Appls. 309, 312 (1911); and *United States v. Michelin Tire Co.*, 1 Ct. Cust. Appls. 518 (1911). The opinion in *Michelin* illustrates how the courts apply this principle, in the following from pp. 526-27:

> In any view it seems self-evident that the india-rubber *product*, whatever it may be termed in trade, of processes applied to old scrap or refuse india rubber, might well be included in the descriptive term "old scrap or refuse india rubber," deriving its description from its source of immediate production. In fact, we do not see how that conclusion can be seriously denied, and that being true, or even if only doubtful, the importer, appellant, is entitled to judgment upon the doctrine of doubt. It must be confessed that the character of the merchandise imported when considered in conjunction with the various provisions of law invoked is not entirely free from doubt. It might be better said that the proper interpretation of the language in paragraph 579 and its intended scope is not entirely free from doubt. The changed phraseology of the corresponding paragraph in the tariff act of August 5, 1909, indicates at least a question in the mind of Congress as to the proper construction and import of the provision of the tariff act of 1897.
>
> In the presence of doubt the importer is entitled to have the doubt resolved in his favor.

In *United States v. Harper*, 2 Ct. Cust. Appls. 101, 105, T.D. 31655 (1911) the Court stated:

> We recognize that the question involved in this case cannot be said to be entirely free from doubt, but resolve whatever doubt exists in favor of the importers. That we should do so is settled law. *American Net & Twine Co. v. Worthington* (141 U.S., 468).

The courts continued to uniformly apply this principle at the trial level, and in a number of appellate decisions.[7]

In a later case, *United States v. Kurt Orban*, 47 CCPA 28, 31, C.A.D. 724 (1959), the court stated: "[W]e think it proper to resolve that doubt [as to the construction to be given a word in the statute] in favor of the importer." [Citations omitted and Explanation added].

More recent appellate cases where this principle is cited in deferring to the importer are *United States v. Greek Orthodox Church of Evangelismos*, 49 CCPA 35, 39, C.A.D. 792 (1962), which recognized: ". . . the rule of liberal construction in favor of the importer stated by the Supreme Court in *Benziger v. United States*, 192 U.S. 38"; *Gorton's of Gloucester, Inc. v. United States*, 52 CCPA 86 (1965); and *Anhydrides, supra*, at 1485. The latest trial court decisions which cite this principle are *Bethlehem Steel Company, Maryland Shipbuilding & Drydock Co. v. United States*, 238 F. Supp. 483, 490 (1964) *rev'd on other grounds*, 53 CCPA 142, C.A.D. 89: (1966), which cited both *Hartranft* and *American Net & Twine*; and *Pistorino & Company, Inc. v. United States*, 82 Cust. Ct. 168, 179-180, C.D. 4799 (1979), which cited both *Greek Orthodox Church* and *Benziger*, only one year before the last major revision of the

7. *See American Express Co., supra*; *Newhall, supra*; and *Goat and Sheepskin Import Co. et al. v. United States*, 5 Ct. Cust. Appls. 178, 183, T.D. 34254 (1914) [in these three cases, the Court of Customs Appeals reversed, giving the terms in issue an interpretation which favored the importer]; *United States v. Gavin & Co.*, 7 Ct. Cust. Appls. 292, 295, T.D. 36804 (1916); *United States v. Darling*, 10 Ct. Cust. Appls. 57, 58, T.D. 38334 (1920); *Central Vermont Railway Co., supra*; *United States v. Field & Co.*, 10 Ct. Cust. Appls. 183, 191, T.D. 38550 (1920); *Downing & Co. (Inc.) v. United States*, 12 Ct. Cust. Appls. 451, 454, T.D. 40614 (1925); and *Harry Zinberg v. United States*, 16 Ct. Cust. Appls 268, 275, T.D. 42870 (1928).

"customs courts' " jurisdiction, which further codified the independent nature of the courts' review.

Most of the cases discussed above which apply the *Hartranft* principle deal with classification provisions, and can be roughly grouped into those which adopt "broad" interpretations or definitions, including *American Net & Twine, supra*, at p. 57, which refused to limit the definition to the "most ordinary" form of the product, and those which adopt "limited" or "narrow" definitions or interpretations. In one case (*Rice, supra*, at pp. 911-12), the court, in adopting one of two possible interpretations of the term "and", very clearly states that it was prepared to adopt whichever interpretation favored the importer. What is common to all of these cases is the adoption by the court, in the case of ambiguity, of that interpretation which favors the importer.

The cases discussed above show that the general rule of administrative law that entitles an agency's interpretation of a statute to deference, applied in *Chevron, supra* ; *Smiley, supra*; *Citizens to Preserve Overton Park v. Secretary of Transportation*, 401 U.S. 402 (1971); and other administrative law cases, does not apply to customs revenue matters such as those involved in the instant case, and that such a rule is, in fact, the antithesis of *de novo* revue of Customs' classification and valuation determinations, with resolution of any ambiguities in favor of the importer.

C. A tariff term must be rendered entirely free from doubt before that term can be interpreted in a manner which disfavors the importer.

The circumstances where the *Hartranft* principle is to be applied are variously stated by this Court as "a doubt" (*United States v. Isham, supra*, at 504 and *Swan & Finch, supra*, at 146), "doubt" (*Hartranft, supra*, at 616, and *American Net & Twine, supra*, at 474), and "any fair doubt" (*Benziger, supra*, at 54). Most of the Court of Customs Appeals and Court of Customs and Patent Appeals opinions utilize similar language; some characterize the test as "entirely free from doubt" (*Michelin, supra*, at 527, and *Harper, supra*, at 105); and in *Sussfeld, supra*, at pg. 52, the Court equated ("it is equally true") the liberality in favor of the government in administrative law such as copyright (a principle of due deference requiring that the government's interpretation

should be sustained unless it is clearly wrong) to liberality in favor of the importer in construing revenue statutes. The principle is therefore a antithetical one, requiring that an interpretation in the importer's favor should be sustained unless clearly wrong.

Certain language, "equal and substantial balance in its favor," at p. 202 of *Hatters' Fur Exchange*, *supra*, (and "substantial doubt" which appears in the preceding sentence therein), and other *dicta*, would appear to make the standard one where the government would prevail upon something slightly beyond a mere preponderance in its favor of all the bases of judgment, but neither *American Net & Twine* nor *Eidman v. Martinez*, the two cases cited to in *Hatters' Fur Exchange*, nor any of the other decisions of this Court relying on this rule, so hold.

Even if the interpretation of the law in the importer's favor is not, in the language which the CAFC used in its opinion in *Springfield Indus. Corp. v. United States*, 842 F.2d 1284, 1285-86 (Fed. Cir. 1988), "what the court itself would otherwise have given it," and even if the government's interpretation might be the better one, the courts should adopt the interpretation which "favors" the importer. Presiding Judge Montgomery, feeling that the government's claimed alternative provision might be the better classification, stated in *Darling*, 10 Ct. Cust. Appls. 57, T.D. 38334 (1920) at p. 58 that:

> . . .[I] do not feel that I should permit such doubt as I possess to lead me to an insistence upon the contrary rule, in view of the other well-established rule that in case of doubt the question involved should be solved in favor of the importer, and this question is not free from doubt.

This is consistent with this Court's statement of the standard on the other hand, agency interpretation, in *Federal Election Comm'n*, *supra*, at p. 39:

> To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."

[Citations omitted].

Under the cases, the interpretation of a term or statute proffered by the importer need not be the only reasonable one, or the one the court would reach without applying the principle of liberal statutory interpretation in favor of the importer, to be sustained.

D. The principle of deference to an agency's interpretation of a statute does not apply to customs classification or valuation, where liberal interpretation in favor of the importer still applies. These antithetical principles have existed side-by-side for more than a hundred years.

> Where the burden is placed upon a citizen, if there be a doubt as to the extent of the burden it is resolved in favor of the citizen, *but* where a privilege is granted any doubt is resolved in favor of the government.

Swan & Finch, *supra*, at 146 (Emphasis added).

The principle with regard to privilege following "but" in the second half of the preceding sentence from *Swan & Finch* has been followed by the CAFC at the urging of the government several times in recent years. *Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991); *Chrysler Motors Corp. v. United States*, 945 F.2d 1187 (Fed. Cir. 1991). In holding on the principle governing privilege stated in the second half of the sentence, the CAFC in neither case addressed the corollary principle on liberal interpretation in favor of the importer stated in the first half, but in deciding *Anhydrides*, *supra*, at 1485, they specifically did so. The Solicitor General now contends that the CAFC, in *Anhydrides*, was in error in following this Court's holding in the first half of that sentence from *Swan & Finch*, but was correct in following the holding in the second half of the same sentence in *Guess?* and *Chrysler*. There has been no overruling by this Court of the principle stated in either half of that sentence from *Swan & Finch*, and it would take an extreme leap of faith to believe that one half of the sentence is still good law, but the other isn't. From *Rice* to *Anhydrides* there were major revisions of the tariff in 1909, 1913, 1922, 1930, 1962, and 1989. Had Congress, arguably being aware of the courts' holdings, wished to change this principle, it could have done so, but in the face of continuing reaffirmation of that principle by the courts, Congress has let it stand.

None of the decisions of **this Court** in customs-related cases, which the government cites in its brief as support for its claim that Customs' is owed deference in its interpretation of tariff statutes, are customs revenue cases. The closest is *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978), which involved the Treasury Department's[8] [not Customs'] interpretation of "bounty" in a countervailing duty case. In its decision, this Court recognized that the purpose of such provisions was not revenue, but to protect domestic industry "from unfair competition." 437 U.S. at 451. *Norwegian Nitrogen v. United States*, 288 U.S. 294, 315 (1933) also involved an agency other than customs, and a procedural, not a substantive, issue; the sufficiency of a hearing procedure before the then Tariff Commission [now United States Trade Commission], in a proceeding involving the flexible tariff provisions of § 315 of the Tariff Act of 1922 [now 19 U.S.C.§ 1336]. This Court has recognized that the purpose of those provisions is not "revenue," but instead equalization of costs of production, another unfair competition provision. *J.W. Hampton, Jr. & Co.*, 276 U.S. 394, 411-13 (1928). Such "international trade" cases have nothing to do with the principle of liberal interpretation of a term in favor of the importer in a tariff (revenue) law concerning valuation or classification. The one "customs" case from this Court which the government does cite, *United States v. Vowell and M'Lean*, 9 U.S. (5 Cranch) 368, 372 (1809), relates to entry and importation procedures, not the issues of classification or valuation which are subject to the *Hartranft* principle.

The only case in any court cited by the government in support of its claim for *Chevron*-type deference (*see* Brief for the United States, petitioner, at 18, footnote 7) which would appear on first examination to be a "customs" case, in fact, is not. *Goodman* is not a general valuation case, but a *Swan & Finch* "privilege" case involving a Free Trade Zone[9]. The distinction between valuation and classification, made by the Court in *IKO*, *supra*, at 626 in distinguishing the issue before it from that in *Goodman*, is meaningless, as neither classification or valuation issues

8. The Trade Agreements Act of 1979 transferred the responsibility for determining the applicable dumping duties from the Department of the Treasury to the Department of Commerce, International Trade Administration. *See* 19 U.S.C. § 1675(a). Such matters involve "trade," not "customs," issues.

9. That FTZ's involve *privilege* is stated in the statute itself: "*Provided*, That whenever the privilege shall be requested. . . ." 19 U.S.C. § 81c.

are subject to *Chevron* deference. The statement of the law in those cases, and others wrongly decided by the CIT, CCPA or CAFC without reference to the *Hartranft* principle, violates the principle of *stare decisis*.

The principles which should be applied in such cases might, for purposes of simplicity using a single decision of this Court for each principle where that factor was in issue, be designated as the 1) *Chevron* [administrative deference],[10] 2a) *Hartranft* [liberal construction in favor of the importer], and 2b) *Swan & Finch* [strict interpretation of privilege][11] principles.

Once the distinctions between these various type of cases is recognized, it becomes apparent that the government's position here is inconsistent with that which it has taken in other recent matters. In addition to citing *Swan & Finch* in *Guess?*, *supra*, and to the court below in *Chrysler, supra*, Customs itself has cited *Hartranft* at least 5 times in the last 15 years (*See* HQ Rulings 559057, 734301, 555032, 554592, and 650376), for another holding, and the principle that underlies *Hartranft* only a year ago, in Customs HQ Ruling 958647, June 16, 1997:

> Finally, even were Customs to agree that there is substantial doubt as to the construction Congress intended to give to Additional U.S. Note 5(a), the U.S. Court of Customs and Patent Appeals (now the U.S. Court of Appeals for the Federal Circuit) has held that it is proper to resolve the doubt in favor of the importer. *U.S. v. Kurt Orban*, 47 CCPA 28, C.A.D. 724 (1959).

In all The Solicitor General argues that an importer seeking review of Customs interpretations of the tariff acts imposing higher duties on the importer should be faced at the beginning with the prospect of a very

10. *See also Overton Park, supra*; *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 877, 894-95 (1995); *Miller v. Youakim*, 440 U.S. 125, 145 n.25 (1979); *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31 (1981) and *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 233 (1986). (At times parties, or the courts, in customs matters have cited to other cases such as these for the *Chevron* principle).

11. *See also Chrysler Motors Corp. v. United States* [drawback], 945 F.2d 1187 (Fed. Cir. 1991); and *Goodman Manufacturing, L.P. v. United States* [FTZ], 69 F.3d 505, 510 (Fed. Cir. 1995).

difficult hurdle to overcome: showing that Customs' interpretation was "unreasonable," even though the importer's position might be as reasonable, or even more so. This is contrary to hundreds of years of common and statutory law in this country, which require that the courts conduct *de novo* review of those interpretations, under current law considering even new issues of law and factual proofs not before the agency when it made its determination, and only then at the **end** of this process (in Customs' own words in the ruling quoted, "finally"), where all of the necessary facts have been established, all of the issues of law have been considered, relevant principles of statutory construction have been applied, and all of the indicators of legislative intent examined[12], and some doubt still remains, resolve that doubt in favor of the importer by refusing to assess the importer with those higher duties, where Congress did not evidence a clear intent to do so.

II. NO INTERVENING DECISION OF THIS COURT OR LEGISLATION HAS ABROGATED THE *HARTRANFT* PRINCIPLE.

A. Earlier cases have rejected the extension of *Chevron*-type deference to customs issues, in decisions which distinguish between customs and other areas of the law.

The government argued in *Semperit Indus. Prods. v. United States*, 852 F. Supp. 1292, 1299-1300 (CIT 1994), as it has argued regularly since, that its classification should be given "due deference," and should be sustained "unless there are compelling indications that it is wrong." These arguments were rejected by the CIT in an analysis which cited no cases applicable to duties.[13] The opinion does cite administrative law cases not involving duties, and counsel seem to have cited none of the

12. *See Sturm, supra*, at § 51, where these aids to construction, as regularly applied by the "customs" courts, are examined, from "absurd or anomalous results," to "*expressio unius est exclusio alterius.*"

13. *Semperit*, a classification case under the HTSUS, in an opinion which is a good summary of the CIT's jurisdiction, recognized the difference between the standard of review in "customs" cases (classification and valuation) on the one hand, and antidumping and countervailing duty cases on the other. The CIT did this based on logic, without going into the extensive body of case law from this Court on liberality in favor of the importer's interpretation in "customs" cases, and therefore stopped short of enunciating the full, proper, rule.

applicable decisions of this Court or the Courts of Appeals, nor argued that they had been overruled.[14]

Issues similar to those on which the government based its argument in *Semperit*, whether differences exist between customs law and other law, had been dealt with eighty-five years earlier, where the court distinguished the courts' liberality in interpreting copyright laws in favor of the government from the principle applicable to customs classification cases. In *United States v. Sussfeld*, *supra*, at p. 52, the court stated:

> We need not determine whether counsel for the Government is correct in asserting that the courts are uniformly liberal in construing the copyright laws. If he is correct in this, it is equally true that the courts are liberal in favor of the importer in construing revenue statutes.

(Citations omitted).

For cases involving customs duties (classification or appraisement), the court can apply the correct law by reference to its own decisions, and should bring to an end citations by the courts below to *Chevron* and similar administrative law cases, in customs revenue cases where their holdings do not apply.

B. Such a well established principle of law as the *Hartranft* principle should not be overruled unless it can be shown to be unworkable, or the decisions on which it is based poorly reasoned.

A question repeatedly decided by this Court is settled beyond further discussion. *Wright v. Sill*, 67 U.S. 544-45 (1863). Even this Court is bound to follow its own precedents where the cases are "too firmly fixed in the . . . jurisprudence to be now displaced." *Bennis v. Michigan*, 517 U.S. 442, 453 (1996)[15], quoting *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921).

14. The government has conceded that none of the authorities cited above have been expressly overruled. "While we know of no authority that has expressly rejected that rule of construction, the courts appear to have ignored it in favor of the statutory presumption of correctness." Brief in *Marubeni America Corporation v. United States*, *supra*, for the United States, appellee, at p. 30.

15. Although the earliest case quoted here goes back to 1838, only 11 (Cont'd)

The considered practice is not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases, *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962), but "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.' " *Payne v. Tennessee, supra*, at 842 (SOUTER, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 202, 212 (1984)). So that a principle developed in a line of cases such as those discussed here is even more bound by precedent than that in *Bennis*, which involved constitutional (Fourteenth and Fifth Amendment) principles.

In *United States v. International Business Machines*, 517 U.S. 843 (1996), the government below had pointed to a line of decisions on a related Constitutional provision, which arguably raised a question concerning what this Court's reasoning on the issue actually involved in *IBM* might be. Despite what the majority called the dissent's "speculative protestations" as to the uncertainty in commercial transactions which might be caused by the application of the finding in *Thames & Mersey*, this Court, citing *Payne, supra*, at 827, and *Smith v. Allwright*, 321 U.S. 649, 665 (1944), held that "*Thames & Mersey* has been controlling precedent for over 80 years, and the government does not, indeed could not, argue that the rule established there is 'unworkable.' " *IBM, supra*, at 856. Here there is no line of decisions rejecting or even raising a question as to the reasoning on which *Hartranft* and the other precedents in issue rest, none of the cases cited by the government in support of its position even cite *Hartranft* or its related cases, and in the face of no argument by the government as to any theory under which such longstanding precedent should be overruled, the principles that animate the policy of *stare decisis* should cause the Court to decline to do so.

C. Enactment of 28 U.S.C. § 2643(b) did not affect the *Hartranft* principle, and any inferences to the contrary drawn from the opinions in *Jarvis Clark* or other CIT/CAFC cases are misplaced.

One of the stated bases for the decision below, and its rejection of the government's plea for deference, is the decision in *Jarvis Clark, supra*.

(Cont'd)
years after the earliest precedent analyzed in *Bennis*, the authorities cited in the cases quoted here carry the principle applicable back to precedents even earlier than those cited in *Bennis*.

For a good discussion of that case, as related to the history of the customs courts, their jurisdiction, and the nature of proceedings in them, *see* Judge Pogue's opinion in *Anval Nyby Powder AB v. United States*, 927 F. Supp. 463, 468-69 (CIT 1996). That opinion also discusses how the operation of 28 U.S.C. §§ 2638, 2640(a), and 2643(b), among other factors, are inconsistent with giving deference to Customs Service interpretations of tariff acts. The government argues (Brief for the United States, Petitioner, at p. 19) that

> [r]espondent fails, however, to identify any specific language in any of these additional statutory provisions that addresses the degree of deference to be given to Customs Service interpretations of the Tariff Act [of 1930].

Reference to Judge Pogue's opinion, where the substance of those provisions is relied on, rather than "any specific language," should satisfy this Court. Why should there be, in the Tariff Act, "any specific language" addressing deference to Customs Service interpretations of the Tariff Act, when such a concept is totally alien to customs jurisprudence, and has been for 150 years?

The "dual burden" now codified under 28 U.S.C. § 2639(a)(1) requires the importer to prove Customs' classification to be incorrect, and its own claimed classification to be correct. Prior to 1980, this led to situations where the courts let an action by Customs stand, although it had been proven to be incorrect, because the "correct" classification had not been proven by the importer. The usual language used in opinions prior to the enactment of 28 U.S.C. § 2643(b), and its interpretation in *Jarvis Clark*, where the importer failed to carry the second part of the dual burden, and plead or prove the proper claim, was to "overrule [the importer's claim] without affirming the decision of the collector." *Marks Bros., Inc. v. United States*, 7 Cust. Ct. 53, 63, C.D. 534 (1941), *aff'd*, 30 CCPA 35, CAD 210 (1942). *Jarvis Clark* recognizes (at p. 876) that the dual burden arises out of the "formalities of pleading," and seems to recognize that the effect of the dual burden's modification through § 2643(b) is limited to providing for the curing of defects of factual proof, which occurred either because that classification had not been claimed by the importer in its protest or pleading, and thus no proof had been adduced with regard to it, or merely because the proofs at trial were, to the court, insufficient. If an importer wished to further pursue

the issue, it was necessary to begin a new case. The purpose of § 2643(b) enacted as part of the Customs Courts Act of 1980, 94 Stat. 1727 was to eliminate such wasteful retrials. Although Representative Vanik stated that purpose as "eliminat[ing] the old double burden of proof,"[16] its purpose in fact was not to eliminate the dual burden, but to eliminate a costly result of it; trials which let admittedly incorrect classifications stand.

Such defects of factual proof, where the "evidence presented," in the words of § 2643(b), was insufficient, are curable either by remand or retrial at the discretion of the court. Defects in pleading, or failure to claim the "correct" classification, the other grounds which formerly resulted in affirmance of "incorrect" classifications, are curable under 28 U.S.C. § 2638, the successor to a provision adopted earlier, which permits the CIT to entertain new claims.

Even a cursory examination of the published decisions of the CIT will show that § 2643(b) is very rarely applied. That section is conditional, applying only if the evidence before the CIT is insufficient for the court to render a decision. Review by the courts was already *de novo* on both the facts and the law, and remand in a relatively few cases for proof of missing facts cannot be said to militate against deference to the government more strongly than that standard. In fact what such remand did was expand the already extensive jurisdiction of a very specialized court.

Whether the court has power of remand for proof of facts does not affect the principle of liberal interpretation in favor of the importer. The courts, under the provisions of the administrative act of June 10, 1890, 26 Stat. 136, had the power to remand for further evidence, which power was taken away by section 28 of the act of August 5, 1909, 36 Stat. 98 (*see Stegeman v. United States*, 1 Ct. Cust. Appls. 208, 209, T.D. 31240 (1911) for a history) because the practice of trying a case piecemeal had fallen into disfavor with the courts. The *Hartranft* principle is no more affected by the 1980 reinstitution of a provision for evidentiary remand in 28 U.S.C. § 2643(b) than it was by the 1909 elimination of such a provision. In 1980 the burden of retrying cases had apparently found

16. Hearings before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, 96th Cong., 2d Sess., on the Customs Courts Act of 1980, February 13 and 28, 1980, p. 296.

disfavor sufficient to tip the balance against the burden of piecemeal litigation which had spurred the 1909 change.

D. The grants of authority cited by the government are limited, and do not constitute such a general grant of authority as to permit it to legislate through rulemaking.

The Solicitor General quotes various snippets of language at pp. 12-14 of his brief, in support of a claim that Congress has delegated to Customs some broad power to limit customs revenue provisions by way of regulation or other interpretation. There is no showing of any considered intent of Congress, in any of the extensive legislative history on the many revisions of the tariff laws, to transfer responsibility for interpretation of the tariff from the courts to Customs. To infer an intent to effectuate such a major change in roles from such brief references alone is overreaching, but a closer examination of those provisions, in context, reveals that even they do not support the government's claim.

The first provision cited to provides authority to the Secretary of the Treasury:

> to issue rules and regulations governing the admission of articles under the provisions of the [tariff] schedules.

19 U.S.C. § 1202 (1982), General Headnote 11 of the TSUS. The delegation of regulatory authority in this first part of General Headnote 11 was only with regard to "the admission of articles." "Admission" is a clearly defined concept within customs, and does not include dutiability, classification, or valuation. *See Inner Secrets/Secretly Yours, Inc. v. United States*, 885 F.Supp. 248, 256 (Fed. Cir. 1995), and 19 CFR § 141.113, cited therein.

Just as the provision on remand in 28 U.S.C. § 2643(b) is contingent on a failure of proof of facts in a customs case, the second basis claimed as support for Customs' regulation here, the power to issue rules or regulations contained in the latter part of General Headnote 11, was dependent on the inability to determine the facts which would establish eligibility for total or partial duty relief from an examination of the article itself in its condition as imported.

> The allowance of an importer's claim for classification, under any of the provisions of the schedules which provide

> for total or partial relief from duty or other import restrictions **on the basis of facts which are not determinable from an examination of the article itself in its condition as imported**, is dependent upon his complying with any rules or regulations which may be issued pursuant to this headnote.

General Headnote 11, TSUS (emphasis added). There is no such power granted by Congress for those situations where the facts establishing eligibility can be determined on importation. This "partial" power is consistent with the provisions of Par. 1615 of the Tariff Act of 1930, from which Item 807.00, TSUS and subheading 9802.00.80, HTSUS, were derived. *See* Appendix 4a-5a. In that provision, the authority to issue regulations was similarly very limited, being delegated only with regard to "proof of the identity of such articles," or the "conditions and regulations" under which repaired articles could be returned. The number of very specific conditions as to eligibility or handling of the goods themselves, imposed directly by Congress in the statute, are also inconsistent with a delegation of broad regulatory authority.

The government's third alleged basis, 19 U.S.C. § 1500(a), (b), falls short as broad authority with regard to classification and valuation, when one examines the heading to those sections: "**§ 1500. Appraisement, classification, and liquidation PROCEDURE.**" [Emphasis added]. The limited authority delegated, and the type of that authority, is consistent with this Court's limitation of Customs' regulatory authority to procedural matters, in *Morrill v. Jones*, 106 U.S. 466, 467 (1882):

> The Secretary of the Treasury cannot by his regulation alter or amend a revenue law. All he can do is to regulate **the mode of proceeding** to carry into effect what Congress has enacted.

(Emphasis added).

The fourth basis, the government's quotation in its footnote 2, at page 13, from the Conference Report issued in the process of adopting the HTSUS, "[t]he Customs Service will be responsible for interpreting and applying the [Harmonized Tariff Schedule of the United States]" (H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549-550 (1988), is only

partial, and, as stated, is misleading. It omits the beginning of the paragraph from which the quotation is taken, which starts at the same page:

> Sections 1209 and 1210 set out the roles of the United States agencies principally responsible for the Harmonized System. These provisions are meant to ensure a broad base of participation in the work relating to the HTS and the Convention.

Sec. 1209 is captioned "**COORDINATION OF TRADE POLICY AND THE CONVENTION,**" and **Sec. 1210**, "**UNITED STATES PARTICIPATION ON THE CUSTOMS COOPERATION COUNCIL REGARDING THE CONVENTION.**" Neither has anything to do with the assessment or collection of duties.

Thus, although Customs as an agency has the power under the statute, and this Court's decision in *Morrill*, to regulate procedures, it does not have the power to limit substantive provisions which deal with classification or valuation, as enacted by Congress. The very last case that the government cites, *United States v. Vowell and M'Lean*, *supra*, merely emphasizes this constraint. The "tariff legislation" being interpreted there related to the procedural aspects of entry and importation, not to classification or valuation.

E. The history of legislation with regard to customs matters has been to expand the courts' jurisdiction; not to limit it by granting the agency the power to limit the scope of duly enacted tariff legislation through administrative interpretations.

The government has established in its brief that there is a long line of decisions applying deference to the regulatory and other interpretations of legislation by agencies other than Customs. The government has not established that there is any decision by this Court, or any court having the relevant precedents before it, applying that deference to determinations on customs classification or valuation. Had Congress wished to change the law with regard to Customs, and grant *Chevron*-type deference to determinations by Customs, it has had numerous opportunities to do so, both before and after the decision in *Chevron*. The government might

even have tried to argue that *Chevron* changed the law, creating new law applying to all agencies, including Customs. But the very argument that the government makes to establish that the principle of deference to determinations by agencies other than Customs is longstanding, emphasizes the difference between the law applicable to those agencies and to Customs, because the contrary law applicable to Customs' determinations is just as longstanding. We are not dealing here with "remedial laws or laws founded upon any permanent public policy," but with the "revenue" laws, which Justice Story carefully distinguished from those others in *United States v. Wigglesworth,* 28 F.Cas. 595, 596-97 (C.C.D. Mass. 1842), in liberally interpreting a customs revenue law in favor of the importer.

It has long been recognized that the tariff acts are drafted in terms of trade, and are not particularly susceptible of uniform interpretation by administrative officials. As Mr. Justice Story explained, because the tariff acts were originally designed as a source of revenue, their classification categories were phrased "according to the general usage and known denominations of trade." *Two Hundred Chests of Tea*, 22 U.S. (9 Wheat.) 430, 438 (1824). Their interpretation, and uniform application, has historically been left to the courts.

Customs law begins in the United States with the second act of our Congress, the Act of July 4, 1789, S.L., Vol. 1, Chap. II, "*An act for laying a duty on goods, wares, and merchandise imported into the United States.*" The power of Congress to lay and collect such duties is specifically set out in the Constitution itself, in Article 1, Section 8, Clause 1. By 1909, shortly after this Court's last decision on the *Hartranft* principle had been handed down in *Benziger*, there had been 261 tariff acts passed by the Congress, or resolutions or proclamations explaining, modifying, or effectuating those various acts. *See* "Tariff Acts Passed by the Congress of the United States from 1789 to 1909," House of Representatives Document No. 671, 61st Congress, 2d Session (1909).

The present tariff law of the United States is contained, for the most part, in the Tariff Act of 1930, as amended, which is codified in Title 19 of the United States Code. There have been major revisions with regard to classification, in 1962, in the Tariff Classification Act of 1962, Titles I and II of Pub. L. 87-456, May 24, 1962, 76 Stat. 72, which adopted the Tariff Schedules of the United States, and in 1988 with section 1207 of

the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, which adopted the Harmonized Tariff Schedule of the United States. There have been major revisions of the law with regard to valuation in 1956, with the Customs Simplification Act of 1956, August 2, 1956, 70 Stat. 943, and in 1979, with the Trade Agreements Act of 1979, Pub. L. 96-39, 93 Stat. 144, 194 (1979). Despite these very major revisions, the basic law is still contained within the framework of the 1930 Act.

The legislative scheme of United States tariff laws has not been a broad framework of enabling legislation, with recognized gaps left to the agency to fill, as is the case with the administrative laws creating or to be administered by other agencies. The tariff laws are, rather, very detailed and specific legislation, with Congress revisiting certain areas time and time again, to refine and alter the law. Congress has never delegated this power to the agency, but has instead specifically empowered the courts to ensure uniformity in the law. The 1980 Customs Courts Act, adopted four years before *Chevron*, confirms that the burden of interpreting the tariff laws, and making their application uniform, was squarely on the courts, and even expands that jurisdiction.[17]

Where the courts, in fulfilling this role of providing uniform decision and national consistency, have held that the agency, Customs, has overstepped its bounds in adopting regulations, Congress has, as it thought appropriate, either let those decisions stand, or enacted legislation to overturn them. *See, for example*, Sen. Rept. No. 101-252 to accompany

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17. Hearings before the Subcommittee On Monopolies and Commercial Law of the Committee On the Judiciary, on the Customs Courts Act of 1980, H.R. 6394, February 13 and 28, 1980. Statement of Congressman Seiberling, "Act will create a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise . . . to assure a national consistency . . ." *Id.* At 1; testimony of Senator Dennis DeConcini,

> The U.S. Court of International Trade would continue to be equipped with the same expertise and specialized skills . . . to insure uniformity of decision and policy to litigants with regard to the adjudication of disputes involving import transactions."

Id. at 3; statement of David M. Cohen, Director, Commercial Litigation Division, Department of Justice, "The bill will take advantage of the expertise of the Customs Court and will ensure uniformity in the important area of international trade." *Id.* at 53.

the Customs and Trade Act of 1990, p. 44, 1990 U.S.C.C.A.N. 971, explaining Congress' overruling of the result in *Madison Galleries, Ltd. v. United States*, 870 F.2d 627 (Fed. Cir. 1989). There Customs had sought to limit the eligibility of certain goods for classification under another duty preference provision (the Generalized System of Preferences for eligible developing countries ("GSP")) through adoption of a regulation, much as it did in this case and in *Morrill v. Jones, supra*. Had Congress been shocked by the courts' failure to give deference to Customs' regulation in *Madison Galleries*, it could have amended the law to grant Customs such deference, rather than merely amend the law. *See also* H.R. No. 98-1015 to accompany the Trade and Tariff Act of 1984, p. 68, 1984 U.S.C.C.A.N. 5027, explaining Congress' overruling of the result in *United States v. Heraeus Amersil, Inc.*, 671 F. 2d 1356 (CCPA 1982). That case did not involve a substantive issue of classification or valuation, but a procedural issue as to when increased duties were payable. Notwithstanding that 19 U.S.C. §§ 105(b) and 1515(a), the sections which Customs cited as the authority for its regulation, had twice been reenacted after adoption of the disputed regulation, 19 CFR 24.3(e), the courts held the regulation to be invalid, as specifically inconsistent with the statute. Congress has already revisited this area thrice[18] before settling on the current law, which is even yet the subject of active discussion. Had Congress been shocked by the courts' failure to give deference to Customs' regulation, it could have amended the law to grant Customs such deference, or the power to dictate the terms of such payments under regulation. Instead, it merely amended, and re-amended, the law.

The ultimate issue as to whether particular merchandise has been classified under an appropriate tariff provision necessarily depends on the meaning of the terms of that provision, which is a question of law. *See W.R. Filbin & Co. v. United States*, 945 F.2d 390, 392 (Fed. Cir. 1991). When, however, there is any ambiguity remaining in the term after all the other tools of statutory construction have been applied, that ambiguity should be resolved in favor of the importer. Justice Story stated this principle on resolving ambiguity in favor of the importer in 1838. In the intervening period, this Court has applied that principle in six cases,

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18. *See* amendments to 19 U.S.C.§ 1505 in the Trade and Tariff Act of 1984, Pub. L. 98-573, October 30, 1984, 98 Stat. 2948; Customs Modernization Act, Pub. L. 103-182, December 8, 1993, 107 Stat. 2205; and Pub. L. 104-295, October 11, 1996, 110 Stat. 3515.

and it has remained unchanged until now. The government, simply ignoring it altogether, has not shown that this principle is "unworkable" or "badly reasoned," and indeed could not do so, in the face of the many cases decided under it by the Board of General Appraisers, the Customs Court, the Court of Customs Appeals, and the Court of Customs and Patent Appeals. Any change in the principle applying to those laws of classification and valuation, which Justice Story characterized in *Wigglesworth* as "revenue" laws, as contrasted with "remedial laws," or "laws founded upon any permanent public policy," is for the Congress, not this Court.

CONCLUSION

For the foregoing reasons, the decision under review should be affirmed.

Respectfully submitted,

RICHARD C. KING
Counsel of Record
JAMES CAFFENTZIS
PETER J. FITCH
FITCH, KING AND CAFFENTZIS
Attorneys for Amici Curiae
116 John Street
New York, New York 10038
(212) 349-7000

APPENDIX A

APPENDIX A — LETTER OF THE UNITED STATES DEPARTMENT OF JUSTICE TO THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED NOVEMBER 25, 1996

U.S. Department of Justice

Civil Division

International Trade Field Office
212/264-9230
Commercial Litigation Branch
FTS/264-9230
JIL:mh 26 Federal Plaza, Room 34
New York, New York 10278-0140

November 25, 1996

Via Overnight Mail

Clerk of the Court
United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

Re: *IKO Industries, Inc. v. United States*,
Appeal 96-1111

Dear Clerk:

With respect to the above-captioned appeal, *IKO Industries, Inc. v. United States*, Appeal No. 96-1111, which was argued

Appendix A

on October 9, 1996, please be advised that a subsidiary issue briefed by the parties, involving the statutory presumption of correctness under 28 U.S.C. §2639 and whether the decision of the appropriate customs official is entitled to deference, is also present in each of the appeals noted below. A copy of this letter is being sent to counsel for each of the parties in these appeals, and it is requested that each of the panels assigned too these appeals be informed of the foregoing. For that purpose we are enclosing 21 copies of this letter. This advice constitutes a supplementation of our previously filed statements pursuant to Rule 47.5.

Marubeni America Corporation v. United States, Appeal No. 96-1310

Better Home Plastic Corporation v. United States, Appeal No. 96-1322
(set for argument on December 3, 1996)

Rollerblade, Inc. v. United States, Appeal No. 96-1397

Anhydrides & Chemicals, Inc. v. United States, Appeal No. 96-1344

Universal Electronics, Inc. v. United States, Appeal No. 96-1345

Anval NYBY Powder AB v. United States, Appeal No. 96-1438

Appendix A

Very truly yours,

JOSEPH I. LIEBMAN
Attorney in Charge
International Trade Field Office

cc: James Caffentzis, Esq. — Appeal No. 96-111
Richard C. King, Esq. — Appeal No. 96-1310
Peter J. Fitch, Esq. — Appeal Nos. 96-1322 and 96-1344
Fitch, King and Caffentzis

Robert Torreson, Jr., Esq. — Appeal No. 96-1397
Powell, Goldstein, Frazer & Murphy

Timothy B. Dyk, Esq. — Appeal No. 96-1345
Jones, Day, Reavis & Pogue

Philip Yale Simons, Esq. — Appeal No. 96-1438
Simons & Wiskin

APPENDIX B — TARIFF ACT OF 1930, PARAGRAPH 1615

Tariff Act of 1930

1615. Articles the growth, produce, or manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means if imported by or for the account of the person who exported them from the United States; steel boxes, casks, barrels, carboys, bags, and other containers or coverings of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks and staves when returned as barrels or boxes; also quicksilver flasks or bottles, drums of iron, steel, or other metal of either domestic or foreign manufacture, used for the shipment of acids, or other chemicals, which shall have been actually exported from the United States; but proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury, but the exemption of bags from duty shall apply only to such domestic bags as may be imported by the exporter thereof, and if any such articles are subject to internal-revenue tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded; photographic dry plates and films of American manufacture (except moving-picture films to be used for commercial purposes) exposed abroad, whether developed or not, and photographic films light struck or otherwise damaged, or worn out, so as to be

unsuitable for any other purpose than the recovery of the constituent materials, provided the basic films are of American manufacture, but proof of the identity of such articles shall be made under general regulations to be prescribed by the Secretary of the Treasury; articles exported from the United States for repairs may be returned upon payment of a duty upon the value of the repairs at the rate at which the article itself would be subject if imported, under conditions and regulations to be prescribed by the Secretary of the Treasury: *Provided*, That this paragraph shall not apply to any article upon which an allowance of drawback has been made, the reimportation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed; or to any article manufactured in bonded warehouse and exported under any provision of law; except that it shall apply to articles (not dutiable under section 504 as unusual coverings and containers) used as coverings or containers for merchandise not subject to an ad valorem rate of duty: *Provided further*, That when manufactured tobacco, which has been exported without payment of internal-revenue tax, shall be reimported it shall be retained in the custody of the collector of customs until internal-revenue stamps in payment of the legal duties shall be placed thereon: *And provided further*, That the provisions of this paragraph shall not apply to animals made dutiable under the provisions of paragraph 1606.